

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated June 12, 2017 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied the evidence establishes that:

- the appellant's impairment is likely to continue for 2 years or more;
- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

Interpretation Act, Section 29

PART E – Summary of Facts

The evidence before the ministry at the time of the Reconsideration Decision included:

Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated November 13, 2016, a physician's report (PR) dated November 14, 2016 which was completed by the appellant's specialist in radiation and oncology (Specialist) who has known the appellant since the week of November 14, 2016 and had seen the appellant once in the past 12 months prior to completing the PWD application. The application also included an assessor report (AR) dated May 9, 2017 which was completed by a general practitioner (GP) who has known the appellant for 5 months at the time of the application and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application. The GP relied on an office interview with the appellant to complete the PWD application.

The evidence included the appellant's Request for Reconsideration (RFR) dated June 04, 2017, in which the appellant emphasized that she is unable to work, and that the side effects of cancer treatment and surgeries have left her with permanent problems that make work impossible. She also stated that she spends half of her time in the washroom and day to day tasks are difficult. She said that she experiences bone problems and her hip continually fractures. She also stated that she deals with anxiety and worry about her cancer returning.

The evidence also included a telephone log dated February 23, 2017 which stated that the Specialist "indicates he has not seen the applicant since November 2016. At that time she appeared to be cancer free. He will be following up again in a few months. The applicant appeared to have a fracture (which could be related to radiation treatment) which caused pain. However, the [Specialist] expected that to resolve in six to 12 months".

Diagnoses

In the PR, the Specialist diagnosed the appellant with metastatic cervical cancer (MCC) with the onset date of September 2016.

Physical Impairment

In the PR the Specialist reported that:

- the appellant's impairment will likely not continue for 2 or more years.
- MCC acute disease. Needs treatment urgently. Cannot work during treatment.
- Chemotherapy treatment interferes with the appellant's ability to perform DLA.
- The appellant's functional skills as can: walk 4+ blocks unaided, climb 5+ steps unaided, lifting and remain seated without limitation.

In the AR, the GP reported that:

- "Chronic difficulties with hip".
- The appellant takes significantly longer with walking indoors/outdoors and climbing stairs and comments: "patient reports takes at least twice as long as someone comparable for [her] age. Will require a break rest after 5 minutes".
- The appellant was not assessed for standing and is independent with lifting and carrying/holding.

In her self-report, the appellant stated in part that:

- Her disability is cervical cancer, numerous surgeries. Most of bowel and bladder removed and radiation to these areas cause permanent damage.
- She experiences extreme fatigue with day to day tasks.
- She spends a major amount of time in bathroom.

- Cancer is now in bone.
- She needs help with day-to-day tasks such as preparing meals, shopping for groceries and some days she is too sick to get out of bed.

Mental Impairment

In the PR the specialist reported that:

- There are no difficulties with communication.
- There are significant deficits with cognitive and emotional function in the areas of executive and emotional disturbance.

In the AR, the GP reported that:

- The appellant's ability to speak, read, write and hear is good.
- Under cognitive and emotional functioning, where asked to indicate to what degree the applicant's mental impairment restricts or impacts specific aspects of daily functioning, the GP commented: "N/A".
- Under social function, where asked to indicate the support or supervision required as related to restrictions in certain specified areas if the applicant has an identified mental impairment, the GP commented: "N/A".
- The appellant is independent with all listed aspects of personal care (except toileting which is indicated to take significantly longer), medications and paying rent/bills.

In her self-report, the appellant stated that she experiences depression and anxiety due to cancer and reoccurring cancer.

Daily Living Activities (DLA)

In the PR, the Specialist reported that:

- Chemotherapy treatment interferes with the appellant's ability to perform DLA.
- The appellant is restricted with meal preparation, basic housework and daily shopping but did not report whether the restrictions are continuous or periodic.

In the AR, the GP reported that:

- The appellant independently performs most listed DLA. The exceptions are as follows:
 1. Toileting, going to/from stores, and carrying purchases home take significantly longer.
 2. Food preparation and cooking require periodic assistance. The GP comments: "mom helps out given chronic fatigue post cancer treatment".

Need for Help,

In the PR the Specialist reported that:

- The appellant does not require any prostheses or aids for her impairment.

In the AR, the GP reported that:

- The appellant lives with family and "mother staying and helping presently".
- Family provides helps with the comment: "patient relies on family given chronic fatigue post cancer treatment (meal preparation and going shopping)".
- "N/A" when asked about assistance provided through the use of assistive devices.
- The appellant does not have an assistance animal.

Additional information

In her Notice of Appeal (NOA), signed and dated June 14, 2017, the appellant stated “I have permanent side effects and problems due to cancer and radiation that I am unable to work. Chronic fatigue and anxiety and bone problems”.

Prior to the hearing the appellant submitted the following information:

- Letter (letter) indicating approval for income assistance from another province dated October 1, 2015.
- Letter from Revenue Canada indicating the appellant’s approval for disability tax credit (tax credit) dated July 25, 2016.
- 2-page radiation therapy record (record).
- 2 operative reports.

Evidence at the Hearing

At the hearing the appellant, in part, stated the following:

- She has a long term illness and the side effects will last longer than 2 years.
- Her condition is chronic.
- She received approval for disability in another province and received a tax credit from Revenue Canada.
- Due to having problems finding a doctor in BC she had her previous doctor from another province complete the form.
- She has problems everyday with her DLA
- She took exception to a comment in the Reconsideration Decision which stated that “it appears you added ‘chemotherapy treatment’ as a written note under question 3 of Section B in the PR.” She stated that her Specialist’s nurse or receptionist listed her diagnosis and medications on the PWD application and it is not the appellant’s handwriting.
- She is not restricted in activities but does take longer due to fatigue and attending the bathroom on a frequent basis.
- Hip pain is chronic because of hip fracture.
- The cancer comes and goes so she does not know why the Specialist told the ministry she was cancer free.
- She had to stop chemotherapy for some time due to hip fracture.
- When completing the PWD application, her Specialist and GP did not contact her doctor from her previous province and, as a result, they only had access to some of her files.
- She is anxious about the cancer and requires help everyday as it is a chronic and on-going problem.

At the hearing the ministry relied on its reconsideration decision.

Admissibility of Additional Information

The ministry did not object to the admission of the additional information.

The panel considered the information in the record and 2 operative reports as being in support of, and tending to corroborate the information referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel admitted the letter in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel considered the information in the letter and tax credit as not being in support of, and tending to corroborate the information referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel did not admitted the letter or the tax credit information in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment that is likely to continue for at least 2 years and that her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

- (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,
- if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

The *Interpretation Act* provides as follows:

Expressions defined

29 In an enactment:

... "**medical practitioner**" means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practise medicine and to use the title "medical practitioner";

Duration

As the ministry noted, in the PR the Specialist answered 'no' when asked if the appellant's medical condition is likely to last 2 years or more. In the telephone log the Specialist indicated that at the time of the PWD application (November 2016) the appellant was cancer free. He also indicated that it was expected that the appellant's pain from her hip fracture would be resolved in 6-12 months.

Given that the evidence provided by Section 2(2)(a) of the EAPWDA requires that an applicant have a severe mental or physical impairment that *in the opinion of a medical practitioner or nurse practitioner* is likely to continue for at least 2 years and that the Specialist, who is a medical practitioner, indicates that the appellant's condition is not likely to continue for 2 year or more, the panel finds that the ministry reasonably determined that the appellant did not meet the legislative criteria of duration pursuant to section 2 (2) of the *EAPWDA*.

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively or for a reasonable duration. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

In the reconsideration decision, the ministry noted that the appellant submitted an AR dated January 24, 2017 which was completed by her physician from another province. The ministry determined that it could not assess eligibility for PWD designation based on this AR because the physician who completed the AR is not registered in BC and therefore does not meet the definition of a prescribed professional for the purposes of completing a PWD designation application. The panel finds that the ministry was reasonable in its determination that the physician who completed the January 24, 2017 is not a prescribed professional for the purposes of completing a PWD application pursuant to section 29 of the Interpretation Act.

Severe Physical Impairment

The ministry found that the information provided by the Specialist and GP in their assessments of the appellant's basic physical functioning and ability to manage activities requires mobility and physical ability does not establish the presence of a severe physical impairment.

In the PR, the Specialist diagnosed the appellant with MCC. As noted by the ministry, the Specialist indicated that the appellant does not need any prostheses or aids for her impairment, and that her functional skills are: can walk 4+ blocks unaided, climb 5+ steps unaided, and lift and remain seated without limitation. In the AR the GP indicated that the appellant is independent with lifting and carrying/holding, standing was not assessed and walking indoors/outdoors and climbing stairs takes significantly longer. The GP indicated that the appellant reported that she takes twice as long to walk indoors/outdoors and climb stairs.

In its reconsideration decision the ministry noted that the phrase 'patient reports' implies that the information provided is based on the appellant's self-report and not based on a medical assessment. The panel finds that the ministry reasonably concluded that the GP's use of the phrase 'patient reports' implies that the assessment of the appellant's functional ability was based on what the appellant reported to the GP and not on his independent assessment, and further, given the fact that the Specialist assessed the appellant as having good functional ability, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment pursuant to section 2(2) of the *EAPWDA*.

Severe Mental Impairment

The ministry found that the information provided does not establish that the appellant has a severe impairment of mental functioning.

In her self-report the appellant stated that she suffers from depression and anxiety due to her cancer. In the PR, the Specialist did not diagnose the appellant with a mental impairment and reported that she had no difficulties with communication, but did indicate that she has significant deficits to cognitive and emotional functioning in the areas of executive function and emotional disturbance.

In the AR, the GP indicated that the appellant's speaking, hearing, writing and reading are good, wrote "N/A" to all listed areas of cognitive and emotional functioning and "N/A" to all listed areas of social functioning.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment. While the panel notes that the appellant indicated that she experiences depression and anxiety about her cancer, the panel finds that the ministry reasonably determined that the assessment provided by the GP does not establish a severe mental impairment. In addition, even though the assessment of the Specialist indicated deficits in cognitive and emotional functioning, the ministry noted that the Specialist did not provide information as to how these deficits impact the appellant's functioning. The *EAPWDA* requires that the ministry be satisfied that the person has a severe mental or physical impairment. Therefore, in order for the ministry to determine whether a severe mental impairment exists, the panel finds that it is reasonable to require the evidence provided by prescribed professionals to include relevant information regarding the extent to which cognitive and/or emotional deficits impact a person's functioning. As this information was not provided by the prescribed professionals in the PR or the AR, the panel finds that the ministry reasonably determined that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time. According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

The ministry noted that in the PR, the Specialist indicated that the appellant's chemotherapy interferes with her ability to perform her DLA. The ministry also noted that the Specialist indicated that the appellant was restricted in the areas of meal planning, basic housekeeping and daily shopping but he did not indicate if these restrictions were continuous or periodic for extended periods, and he indicated that all other listed tasks are performed independently.

The ministry noted that in the AR, the GP indicated that toileting (every 30 minutes at least 6 times per night), going to/from stores and carrying purchases home take significantly longer, but he did not indicate how much longer the latter two take. The GP indicated that periodic assistance was required with preparing and cooking food. The ministry noted that the GP did not indicate the frequency and duration of the assistance that is required for these tasks therefore it is unable to determine that the appellant's restriction is both significant and periodic for extended periods.

Section 2(2) of the *EAPWDA* requires that, in the opinion of a prescribed professional, a person's ability to perform daily living activities must be directly and significantly restricted either continuously, or periodically for extended periods. The panel finds that the ministry's determination that this criterion is not met is a reasonable application of the legislation as there is insufficient indication as to how much longer the appellant takes to go to/from stores or carry purchases home thus it is difficult to determine if this restriction is significant. The panel also finds that the ministry's decision that this criterion is not met is a reasonable application of the legislation as there is insufficient information as to the frequency and duration of the periodic assistance that is required. The panel finds that the ministry was reasonable in its determination that there is not enough evidence to confirm that the appellant's impairment significantly restricts DLA continuously or periodically for extended periods pursuant to Section 2(2)(b)(i) of the *EAPWDA*.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel finds that as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, , it cannot be determined that the appellant requires help to perform DLA under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.